87-780

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALAN D. POLLAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether Section 3143(b)(2) of the Bail Reform Act of 1984, which authorizes detention, pending appeal, of a convicted defendant who presents no "substantial question" of law or fact is so vague so as to be the equivalent of no standard at all?

(a) Whether the split-in-circuits on the meaning of "substantial question" mandates review so that the Court may determine just what the term "substantial question" means?

(b) Whether where, as here, the government concedes that an appellant is neither a danger nor a risk of flight . . . then should "substantial question" be deemed to be any question which might grant appellant eventual direct appellate relief?

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeals for the Seventh Circuit.

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OPINION BELOW

There is no opinion below.

On September 21, 1987 a panel of Circuit Judges declined to grant release, per Petitioner's written motion seeking release pending appeal. That order declining to grant release is appended at App. 1.

Subsequently Petitioner sought release in this Court. Justice Stevens declined to grant release pending appeal on October 6, 1987 (App. 2).

Neither the Seventh Circuit order nor the order of Justice Stevens is published.

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit arises from a decision by that Court rendered on September 21, 1987. The Petitioner subsequently sought the same relief from this Court via a motion for release, pending appeal. Justice Stevens denied that motion on October 6, 1987.

This Court has jurisdiction to review the order by Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3143(b) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3143(b), provides in pertinent part:

> **(b) Release or detention pending appeal by the defendant.**—The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—
>
> (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment.

U.S. Constitution, Amendment V:

". . . nor be deprived of life, liberty, or property, without due process of law."

U.S. Constitution, Amendment VI:

". . . and to have the Assistance of Counsel for his defense."

U.S. Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive finds imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Pollak was arrested by federal agents near Tampa, Florida on April 15, 1986 pursuant to an arrest warrant issued by a U.S. Magistrate in Chicago, Illinois on the same date. The arrest warrant alleged that Pollak conspired to purchase cocaine in Chicago on April 14, 1986. Pollak was released by a U.S. Magistrate in Tampa, Florida on April 18, 1986 and directed to return to Chicago (App. 3).

Pollak appeared before a U.S. Magistrate in Chicago on April 25, 1986 with counsel. His earlier release was approved.

On April 25, 1986 Pollak, in the company of his attorney spoke to counsel for the government. Counsel for the government urged Pollak to cooperate with the government . . . if he didn't he would probably get a 10 year prison sentence.[1]

[1] Pollak's cooperation efforts and his agreement with the government become a pivotal appellate issue; as later events reveal the government conceded the April 25, 1986 conversation and agreed that Pollak cooperated.

Pollak cooperated with the government throughout late April and May, 1986. Initially Pollak was indicted for conspiring to purchase cocaine, a single count indictment returned on May 15, 1986 in the U.S. District Court, Chicago, Illinois. This indictment was consistent with the cooperation agreement as between Pollak and the government (Group App. 4).[2]

In August, 1986, a superseding indictment was returned. In that indictment Pollak and 13 other persons were charged in a 28 count indictment alleging multiple federal drug violations from September, 1980 to July 7, 1986.[3]

From September, 1986 through April, 1987 Pollak was continually denied "enforcement" of his agreement. On April 17, 1987 counsel for Pollak moved for indictment dismissal or other relief (in writing); in that motion which was filed "under seal" Pollak expressed his dismay at the government's "breach" of the verbal agreement. On April 17, 1987 the trial judge listened to argument on the motion, made no ruling, took no evidence and the government filed no pleading opposing indictment dismissal . . . or other relief. The trial judge heard that Pollak agreed to cooperate with the government as of April 25, 1986 after counsel for the government told him he would get 10 years if he didn't cooperate. The government's "offer" to Pollak, post-cooperation was 10 years.

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[2] The original indictment is reproduced at App; 4; this indictment was within the parameters of the verbal agreement as between Pollak and the government. The "agreement" was never reduced to writing.

[3] The government will agree that Pollak could not be a part of any conspiracy from April 22, 1986 to July 7, 1986 (Counts 19-28 of the superseding indictment, 86 CR 589). Out of respect for brevity we do not reproduce that 34-page indictment at this time.

The trial judge made no ruling (thus, presumptively denied the Pollak motions) and on April 27, 1987 Pollak dismissed counsel in open court.

Pollak, with the benefit of newly retained counsel commenced trial on May 7, 1987. Pollak, within the superseding indictment, was charged in 4 counts; on June 10, 1987 he was convicted on all counts. On June 10, 1987 the trial court amended Pollak's release order allowing Pollak to remain enlarged pending sentencing (App. 5).

Timely post-verdict motions were filed. Within those post-verdict motions Pollak sought hearings on the breach of the agreement, on whether the government used Pollak's [immunized] statements against him during trial and on whether Pollak was denied counsel of his choice. The trial court took no evidence, heard no testimony and denied these post-conviction motions.[4]

On August 27, 1987 Pollak was sentenced to 6 years in custody with 5 years probation to follow and was given the opportunity to voluntarily surrender on October 6, 1987.

On September 3, 1987 Pollak sought release, pending appeal, from the trial judge in accordance with 18 U.S.C. § 3143(b)(1)(2). The trial court, while declining to grant relief found that Pollak *was neither a danger nor likely to flee* (App. 6).

On September 21, 1987 the Court of Appeals for the Seventh Circuit rejected Pollak's request for release pending appeal; on October 6, 1987 Justice Stevens likewise declined to act favorably on Pollak's motion.

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[4] Both the April 17, 1987 and the post-verdict motions were filed "under seal." On September 3, 1987 the trial judge unsealed the motions and the April 17, 1987 "*in camera*" transcripts for purposes of appellate review.

REASONS FOR GRANTING THE WRIT

This case presents a question of great importance to the administration of criminal law.

The petitioner was found to be neither a danger nor likely to flee (App. 6). Thus, the Bail Reform Act of 1984 can only be used to deny Pollak release, pending appeal, if:

> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment. (18 U.S.C. § 3143(b)(2))

Inter alia, it is our position that the B.R.A. fails to support detention, pending appeal where the applicant is:

(1) Appealing as a matter of right,[5]

(2) has been found to be neither a danger nor a flight risk, and

(3) the questions to be presented are non-frivolous.

The B.R.A. is hardly sacrosanct; this Court has twice reviewed portions of the B.R.A. and found the statutory language to be, in part, wanting and not at all conflict-free.[6] That portion of the B.R.A. which petitioner attacks

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[5] Pollak is appealing as a matter of right, *Carroll v. United States*, 354 U.S. 394, 400 n. 9 (1957), F.R.A.P., Rule 4(b), 28 U.S.C. § 1291. In *Evitts v. Lucey*, 469 U.S. 387 (1985) the Court found that a criminal defendant was entitled to effective assistance of counsel on his first appeal as a matter of right.

[6] The Bail Reform Act of 1984 was twice the subject of review by this Court in 1987. In *Rodriguez v. United States*, ___ U.S. ___, 107 S.Ct. 1391 (1987) (per curiam) the Court found that

(Footnote continued on following page)

not only lacks guidance and definition but the lack of realistic definition has resulted in a conflict-in-circuits as to an appropriate analysis (see *Wright, Federal Practice and Procedure,* Criminal 2nd at pp. 30, 1987 pocket part, collecting conflicting [standard] decisions).

Certainly the inability of the circuits to agree upon a workable standard is of sufficient merit for the granting of review.

The court below denied release pending appeal, stating:

> "Defendant-appellant has failed to demonstrate by clear and convincing evidence that this appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial." (See App. 1)

As suggested earlier, Section (b)(2) of the B.R.A. fails to realistically define SUBSTANTIAL . . . the circuits lack accord. In *United States v. Handy,* 761 F.2d 1279 (CA 9, 1985) the Court granted release, pending appeal, defining "substantial question" as one that is "fairly debatable" (761 F.2d at 1282). The Ninth Circuit specifically rejected the "substantial question" definition provided by the Eleventh Circuit in *United States v. Giancola,* 754 F.2d

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[6] *continued*
federal judges had authority to suspend the execution of sentences and [to] impose probation for an offense committed while on release contrary to that portion of the B.R.A. which seemingly directs to the contrary, 18 U.S.C. § 3147.

In *United States v. Salerno,* ____ U.S. ____, 107 S.Ct. 2095 (1987) the Court held that Salerno, as a dangerous person, could be detained pretrial without violating substantive due process (Justices Marshall and Brennan dissenting, Justice Stevens separately dissenting).

The Court specifically declined to consider the constitutionality as to other portions of the B.R.A., 107 S.Ct. at 2100, n. 3, 2101, n. 4.

898, 901 (CA 11, 1985) (it is a "close" question . . . one that very well could be decided the other way; whether a question is "substantial" must be determined on a case-by-case basis . . . *Giancola*, 754 F.2d at 901). The Second Circuit is inclined to adopt the *Giancola* standard, *United States v. Randell*, 761 F.2d at 125 (CA 2, 1985), *cert. denied*, 106 S.Ct. 533 (1986).

The Third Circuit suggests that the issue(s) on appeal must be significant, novel, not governed by controlling precedent . . . or fairly doubtful, *United States v. Smith*, 793 F.2d 85, 86 (CA 3, 1986) rejecting standards from the First, Second, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits . . . while apparently adopting the Ninth Circuit standard, *United States v. Handy*, 761 F.2d 1279, 1281 (CA 9, 1985). In *Smith* there is a strong dissent . . . while in the companion case to *Smith*, *United States v. Messerlian*, 793 F.2d 94 (CA 3, 1986) two (2) of the Circuit Judges in *Smith* voted to grant release pending appeal . . . the same relief denied in *Smith*.

Professor Wright states that the Third Circuit test has been adopted by a number of Courts although most have preferred a somewhat stricter interpretation of that which constitutes a "substantial" question and some have read "likely to require reversal" as meaning that "it is more probable than not" that a favorable decision would result in a reversal or a new trial (1987 pocket part, § 767 at p. 29).

As indicated the Third and Ninth Circuits seemingly take a more liberal approach than do the balance of the Circuits on "substantial question."

Guidance on this score certainly can be gleaned from earlier decisions of the Court. For example, in *Harris v. United States*, 404 U.S. 1232 (1971) Justice Douglas, as

a Circuit Justice granted release [bail] pending appeal where the government's primary opposition was that:

> "[T]here are no substantial questions raised by the appeal." (404 U.S. at 1233)

Justice Douglas while reviewing the evidentiary questions presented via the *Harris* motion for release found that evidentiary questions within the purview of review of an application (for bail) can raise nonfrivolous—even "substantial questions" even though the application raised primarily evidentiary questions. Stated otherwise, the test (at least then) was *nonfrivolous*.

In *Leigh v. United States*, ____ U.S. ____, 82 S.Ct. 294 (1962), Chief Justice Warren granted release on bail, pending appeal in a case where Leigh had been in custody from January, 1961 until the date Justice Warren granted bail, May 11, 1962. We suggest, that the periods of time are peculiarly important here because our Group App. 7 demonstrates that the briefing schedule in petitioner's case shows that in all probability his case will not be argued (let alone decided) until the winter of 1988.[7]

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[7] Based on the complexity and length of the trial petitioner is not suggesting that the briefing schedule is unrealistic or unfair. We ask this Court to consider THE LENGTH OF TIME THIS APPEAL WILL TAKE IN CONNECTION WITH RELEASE *VEL NON* WHERE THE PETITIONER IS NEITHER DANGEROUS NOR A RISK OF FLIGHT; INDEED, THE GOVERNMENT CONCEDED SAME IN THE COURT OF APPEALS (See App. 8).

In *Leigh*, Chief Justice Warren also noted:

> The rule authorizing bail pending appeal establishes two criteria by which an application for such relief is to be judged: whether the appeal is not frivolous or whether it is not taken for delay. If these standards are met, bail should ordinarily be granted for, as has been pointed out, bail is "basic to our system of law." *Herzog v. United States*, 75 S.Ct. 349, 351. (82 S.Ct. at 96)

In *Sellers v. United States*, ____ U.S. ____, 89 S.Ct. 36 (1968) Justice Black, granted an application for release, pending appeal, where the record there showed (as it here does) that *Sellers* was neither a danger nor a risk of flight. As regarding friviality *vel non* . . . Justice Black noted that the frivolous nature of the appeal must be viewed from the standpoint of an assumption that the appeal is not frivolous (89 S.Ct. at 39).

Justice Black, also stated:

> The command of the Eighth Amendment that "Excessive bail shall not be required * * * " *at the very least* obligates judges passing upon the right to bail to deny such relief only for the strongest reasons. (89 S.Ct. at 38)[8]

Petitioner urges that this Court consider some of the older decisions simply from the standpoint of the appropriate standard involved while detaining petitioner . . . where the potential appellate issues are clearly non-frivolous; indeed, in our view, substantial and at least in part, even compelling. We set forth, *infra*, three (3) of the potential "substantial" appellate issues.

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[8] In *Salerno* the Court declined to flatly reject the notion that the Eighth Amendment might compel release, pretrial, 107 S.Ct. at 2104, 2105 (Justices Marshall, Brennan and Stevens dissenting).

In *Hilton v. Braunskill*, ____ U.S. ____, 107 S.Ct. 2113 (1987) the Court held that both flight and danger could be considered in connection with staying a district court order granting habeas relief. Within *Hilton* the Court noted:

> "Unlike a pre-trial arrestee, a state habeas petitioner has been adjudged guilty beyond a reasonable doubt by a judge or jury, and this adjudication of guilt has been UPHELD BY THE APPELLATE COURTS OF THE STATE," (107 S.Ct. at 2120).

Here, of course, petitioner has his direct appeal pending and thus his conviction has not been upheld on appeal (in *Hilton* Justices Marshall, Brennan and Blackmun dissenting).

(A)

WHETHER THE GOVERNMENT USED PETITIONER'S IMMUNIZED STATEMENTS [AGAINST PETITIONER] DURING HIS TRIAL?

* * * * *

WHETHER THE FAILURE TO CONDUCT ANY HEARING ALONE MERITS VACATION OF THE CONVICTIONS AND PLENARY REMAND FOR EVIDENTIARY HEARINGS?

From approximately April 25, 1986 through June 1, 1986 (and possibly thereafter) petitioner had some 4 to 5 meetings not only with government counsel but with federal agents representing the IRS, DEA and Customs. Petitioner, per the verbal agreement he had with the government, told government counsel and the agents during these meetings all about himself, and others in connection with matters relating to the [later] superseding indictment.[9]

The law, as we understand it, prohibits the government from using the information tendered under such circumstances unless the government can prove [a heavy burden] that the evidence was [is] derived from a source wholly independent of the compelled testimony . . . *Kastigar v. United States*, 406 U.S. 441, 453, 460, 92 S.Ct. at 1661, 1665 (1972).

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[9] During late April and May, 1986 petitioner was "debriefed" by government counsel and several agents. Government counsel (government trial counsel) participated in at least 2 of the 4 or 5 meetings; the balance of the meetings were with the federal agents from the DEA, IRS and Customs. The government conceded on April 17, 1987 that petitioner kept his end of the bargain, the government did not even intimate that petitioner "breached" the agreement.

The only practical way to make such determinations is through the conducting of hearings . . . where testimony was taken and the trial judge has the benefit of the putative defendant's proffer to the government, see *United States v. Williams*, 817 F.2d 1136, 1138 (CA 5, 1987) (directing a remand on this score . . . on rehearing). In *Williams*, while directing a plenary remand the Court noted:

> "Appellant Jan Grossman asks us to reconsider our holding that the government met its burden of proving that it used evidence derived from legitimate independent sources to prove his guilt. Grossman had talked to the DEA under an informal grant of use immunity. In our original opinion, we addressed only the use of evidence *before the Grand Jury*. Grossman asserts that the government has the burden of proving that the evidence presented at the trial was *not tainted. We agree.* The district judge did not have Grossman's immunized statements when he conducted the original *Kastigar* hearing and therefore would have been unable to decide the issue fairly. See *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). The fact that Grossman talked to the DEA before his indictment under a grant of use immunity shifts the burden to the government "to demonstrate by a preponderance of the evidence an independent source for all evidence introduced," *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974). The *Kastigar* hearing held by the district court was insufficient and therefore we remand with orders for the district court to conduct a hearing in accordance with the dictates of *Kastigar* and of this opinion," (817 F.2d at 1138, emphasis ours).

Similar Seventh Circuit decisions include both *United States v. Brimberry*, 744 F.2d 580, 586, 587 (CA 7, 1984) and *United States v. Lyons*, 670 F.2d 77, 80 (CA 7, 1982). In *Brimberry*, the Court found that the trial court com-

mitted plain error while not holding a plenary hearing, *sua sponte*, under similar circumstances. The Court noted:

> "We find that an evidentiary hearing on this point is necessary to avoid a miscarriage of justice," (744 F.2d at 587).

In *Lyons*, the Court affirmed a bid-rigging series of convictions where a similar issue was presented. However, in that case the trial court held a hearing and heard the testimony of government and defense lawyers attending meetings involving the alleged or potential immunized testimony (670 F.2d at 80). Because a plenary hearing was held the Court of Appeals found no clear error within the trial judge's determination that there was no breach of an agreement (670 F.2d at 80).[10]

We realize that the current submission does not have with it either the transcript of April 17, 1987 nor the pleadings submitted by Pollak for pretrial indictment dismissal and post-trial relief. We realize our current record is scant and is based upon assertions of counsel coupled with applicable authority. However, we also know that the Court is entitled to the candor of ALL COUNSEL (*United States v. Ott*, 489 F.2d 872 (CA 7, 1972, Stevens, Circuit Judge for the Court) and our submission is honest

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[10] In *Lyons* the reported opinion allows for the simplistic proposition that the U.S. Attorney in Chicago does not make "derivative use" of such immunized statements . . . 670 F.2d at 80, see n. 4 also. The instant case was prosecuted by the U.S. Attorney's Office in Chicago and thus we might well rely on the statement in *Lyons* excluding "derivative use."

To our way of thinking the Court of Appeals here even declined to follow its own more recent precedent, *United States v. Verrusio*, 803 F.2d 885 (CA 7, 1986) (remanding case for plenary hearings where the government must bear the burden of proof on agreement *vel non*).

and candid. We assume any response from the government, if ordered by the Court, will be similarly candid.

We submit that again, on this issue, we are entitled to full and complete hearings before the District Court Judge where that Judge would have the benefit of Pollak's multiple pre-indictment proffers. The trial judge would then compare those proffers with grand jury testimony and trial testimony and exhibits in order to make a determination as to whether the government impermissibly utilized the statements given by Pollak per an implied immunity pre-indictment agreement.[11]

(B)

WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHILE DECLINING [BOTH PRE- AND POST-TRIAL] TO CONDUCT ANY HEARINGS WHATSOEVER IN CONNECTION WITH THE PETITIONER'S ALLEGATIONS THAT THE GOVERNMENT BREACHED THEIR AGREEMENT?

Petitioner unquestionably entered into a verbal agreement with government counsel in April, 1986. That agreement called for petitioner to be fully debriefed (thus giving up his Fifth Amendment protections). Petitioner implicated himself and others in exchange for the verbal agreement . . . *substantial sentencing considerations.*

On April 17, 1987, some 2 weeks prior to petitioner's trial a motion was filed by counsel for the petitioner. That motion sought indictment dismissal, specific performance

[11] There is a certain blending as between plea agreements and immunity agreements. Our current inability to totally separate one from the other is understandable. Even the Court tends to confuse same, see *Plaster v. United States*, 789 F.2d 289, 293 (CA 4, 1986).

or such other relief as the trial court might find appropriate. That motion, reproduced as App. 9 to this petition also requested that the court conduct hearings as might be appropriate in light of petitioner's moving documents and the affidavit/exhibit appended to that pleading (fully reproduced at Group App. 9). During the April 17, 1987 "in chambers" proceeding the government agreed with the facts . . . the government contested the scope or parameters of the agreement[12]

It cannot be doubted that:

> "*Any agreement made by the government must be scrupulously performed and kept.*"[13] (emphasis added)

It is our position that not only was there an agreement, but there was a breach of that agreement [by the government] and under such circumstances a fact-hearing must be held. The hearing would consist of the petitioner's proofs, the government's response . . . and the burden would be on the government to show that petitioner *breached* the agreement, *United States v. Verrusio*, 803 F.2d 885, 890, 891 (CA 7, 1986). In the event the government could not show a *breach* by a preponderance of the evidence—then petitioner would be the beneficiary of either indictment dismissal or "specific performance" in connection with his agreement.

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[12] The April 17, 1987 has been "unsealed" per the trial court post-sentencing order of September 3, 1987. That transcript is yet unavailable to petitioner. In the event certiorari is granted we assume that either the government or the petitioner can supply same to this Court.

[13] *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. at 498 (1971); *United States v. Lyons*, 670 F.2d 77, 80 (CA 7, 1982). In *United States v. Verrusio*, 803 F.2d 885, 888 (CA 7, 1986) the Court, while granting relief noted that *due process* is clearly involved in connection with the enforcement of a plea bargain, citing, *Santobello*, 404 U.S. at 262, 92 S.Ct. at 498-499.

A recent decision from the Court, *Mabry v. Johnson*, 467 U.S. 504 (1984), dealt with plea agreements; in *Mabry* the Court rejected an argument under totally dissimilar circumstances. In *Mabry* there was an offer (by mistake) which was accepted . . . but possibly withdrawn prior to any change of position by either party. Under those circumstances the Court justifiably held that Johnson was without the ability to seek the enforcement of a plea offer which was made by mistake. In *juxtaposition*, petitioner changed his position here, his Fifth Amendment protections were aborted based on the agreement and the government must now be held to the terms of the bargain. Of course, we do not know (because the trial court conducted no hearing) whether the government utilized the information provided by the petitioner . . . against him during his trial.

It is our position on this issue that petitioner has submitted a sufficiently novel question . . . so that it cannot be easily found . . . that he is not entitled to relief.[14] Thus we urge on this point that petitioner has made sufficient showing to warrant release, pending appeal, particularly where the government concedes that petitioner is neither a danger nor a risk of flight.

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[14] Petitioner was compelled to stand trial because of the breach by the government; on April 27, 1987 he discharged the attorney of his choice and new counsel represented petitioner during the 5 week jury trial that commenced on or about May 5, 1987. The superseding indictment (returned after the petitioner fully cooperated with the government) converted the post-agreement charges against petitioner from a single count indictment into a 28 count indictment where petitioner was charged in 4 separate counts. Petitioner stood trial on the superseding indictment and was convicted on all 4 counts.

But for the government's breach-of-agreement petitioner would not have discharged counsel of his choice, retained new counsel and been forced into a trial posture!

(C)

WHETHER THE GOVERNMENT'S CONDUCT MIGHT AMOUNT TO AN INTERFERENCE WITH THE SIXTH AMENDMENT RIGHT TO COUNSEL?

Some of the facts below would show that Pollak consulted with counsel [of his choice] prior to entering into his agreement with the government during late April, 1986. Pollak sought the advice of that attorney after Pollak conferred with trial counsel for the government in the Federal Court Building in Chicago, in late April, 1986. It was during that meeting that the U.S. Attorney said he would get ten (10) years if he didn't cooperate (assuming Pollak went to trial and was convicted). While defense counsel was not present during any of the multiple meetings as between Pollak and the government during late April, May and June, 1986 . . . nonetheless Pollak would contact defense counsel simply to keep defense counsel abreast of the progress per these several meetings. Pollak's understandable uncertainty . . . was made known to defense counsel . . . and defense counsel repeatedly assured Pollak that the government "could be trusted."[15]

Post-April 17, 1987 . . . Pollak discharged the attorney of his choice (on April 27, 1987). This firing of counsel (counsel could no longer be trusted) was consistent with the representations made during the April 17, 1987 *in camera* conference. Pollak proceeded to trial with a differ-

[15] The representations, *ante*, were part of the pretrial pleadings submitted to the Court on April 17, 1987 (App. 9). The *in camera* transcript will disclose the government concessions during the April 17, 1987 proceedings. It was during these proceedings that Pollak's counsel advised the court that he probably would be discharged because the petitioner could no longer trust him in the event the trial judge declined the granting of any pretrial relief.

ent attorney . . . an attorney arguably . . . not of his choice. The attorney of his choice having been the subject of potential interference via governmental [mis]conduct within the agreement (breached) setting.

In *United States v. Irwin*, 612 F.2d 1182 (CA 9, 1980) the Court discussed a similar type of prejudice. The Court noted:

> "Prejudice can manifest itself in several ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence *which destroys the defendant's confidence in his attorney*, and from other actions designed to give the prosecution an unfair advantage at trial," (612 F.2d at 1187; emphasis ours).

Of course, no hearing was held; no facts developed. However, as we view the law . . . if we are right . . . and if the government interferred with Pollak's COUNSEL OF CHOICE to the point where he may have been denied this constitutional protection . . . then he would be entitled to a new trial even absent a showing of prejudice, see *United States v. Diozzi*, 807 F.2d 10, at 16 (CA 1, 1986) citing, with approval, *United States v. Flanagan*, 465 U.S. at 268-269, 104 S.Ct. at 1056-1057 (1984); in accord, *United States v. Panzardi Alvarez*, 816 F.2d 813 at 818 (CA 1, 1987) (reversing federal drug conviction where trial judge precluded out of district counsel from representing that defendant; assuming harmless error test could be applied).[16]

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[16] *Maine v. Moulton*, 474 U.S. ____, 106 S.Ct. 477 (1985) may also be supportive of our position ("the prosecutor and police have an affirmative obligation not to act in a manner that circumvents

(Footnote continued on following page)

It is our position that on this issue also we have presented a question which cannot be answered because the trial court declined to make any findings, hold any hearings . . . notwithstanding a post-verdict motion seeking, *inter alia*, a hearing on this issue also.

CONCLUSION

We submit that the circumstances are compelling. The circuits lack accord as to the appropriate implementation of that section of the 1984 Bail Reform Act which gives rise to the question of when, and under what circumstances, might a defendant be released, pending appeal.

The petitioner should not be denied release pending appeal because of an accident of geography (i.e., certainly

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[16] *continued*
and thereby dilutes the protection afforded by the right to counsel," (106 S.Ct. at 485)).

In *Mabry v. Johnson*, 467 U.S. 504 (1984) the Court rejected a similar argument, 104 S.Ct. 2548, n. 10. In *Mabry* the right to counsel argument demonstrated no reason to lose faith in counsel, the offer had been tendered by the state prosecutor by mistake, and the respondent suffered no change-of-position (the mistaken offer was tendered to the respondent on a Friday, accepted, but withdrawn by the prosecutor on Monday) . . . the Court found the lack of change in position could not rise to a counsel of choice violation, 104 S.Ct. 2548, n. 10.

Obviously there was a change of position here, a series of meetings and a realistic reliance on defense counsel, *vis-a-vis*, cooperation *vel non*; agreement *vel non*; breach of agreement *vel non*.

Certainly within the context of this case a "right to counsel" question is hardly frivolous; indeed, it is "substantial."

per the Third and Ninth Circuit standards he would have been released, *contra,* the Seventh Circuit).

This petition presents an appropriate vehicle for the Court to review and define "substantial question" within the framework of 18 U.S.C. § 3143(b)(2).

The petitioner, Alan Pollak, requests, that this Court enter an order granting him release, pending the determination of his direct appeal and pending the disposition of his petition for writ of certiorari.

Respectfully submitted,

ALLAN A. ACKERMAN
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorney for Petitioner
Alan D. Pollak

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APPENDIX 1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 21, 1987.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 87-2414 vs.

ALLAN D. POLLAK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 86 CR 589—**John A. Nordberg**, *Judge.*

This matter comes before the court for its consideration of the following documents:

1. "EMERGENCY MOTION BY ALAN POLLAK, DEFENDANT-APPELLANT, PER 18 U.S.C. §3143 and F.R.A.P. RULE 9(b) ALONG WITH CIRCUIT RULE 9 . . FOR RELEASE, PENDING APPEAL" filed herein on September 9, 1987.

2. "GOVERNMENT'S OPPOSITION TO DEFENDANT'S EMERGENCY MOTION FOR RELEASE ON BOND PENDING APPEAL" filed herein on September 16, 1987.

Defendant-appellant has failed to demonstrate by clear and convincing evidence that this appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial. Accordingly,

IT IS ORDERED that the "EMERGENCY MOTION BY ALAN POLLAK, DEFENDANT-APPELLANT, PER 18 U.S.C. §3143 and F.R.A.P. RULE 9(b) ALONG WITH CIRCUIT RULE 9 . . . FOR RELEASE, PENDING APPEAL" is DENIED.

APPENDIX 2

(Letterhead Of)

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

October 7, 1987

Allan A. Ackerman, Esquire
2000 North Clifton Avenue
Chicago, IL 60614

Re: Alan Pollak v. United States,
A-274

Dear. Mr. Ackerman:

Your application for release pending appeal in the above-entitled case has been presented to Justice Stevens, who has endorsed thereon the following:

"Motion is
denied.
John Paul Stevens
10/6/87"

Very truly yours,
JOSEPH F. SPANIOL, JR., Clerk

By /s/ EDWARD L. TURNER, JR.
Edward L. Turner, Jr.
Assistant Clerk

cc: Hon. Charles Fried, Solicitor General

APPENDIX 3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v. APPEARANCE BOND

ALLEN DAVID POLLAK

Defendant CASE NUMBER:86-144-M-J

I, the undersigned defendant acknowledge that I and my . . .

Surety: We, the undersigned, jointly and severally acknowledge that we and our . . . personal representatives, jointly and severally, are bound to pay to the United States of America the sum of $1,000,000.00 CASH OR CORPORATE and there has been deposited in the Registry of the Court the sum of $ SURETY in cash or (describe other security.)

The conditions of this bond are that the defendant ALLEN DAVID POLLAK is to appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of defendant's release as may be ordered or notified by this court or any other United States District Court to which the defendant may be held to answer or the cause transferred. The defendant is to abide by any judgment entered in such manner by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment, and to obey and perform the further conditions of release in the Order of Release attached hereto.

It is agreed and understood that this is a continuing bond (including any proceeding on appeal or review) which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and any other laws of the United States.

This bond is signed on 4/18/86 at Tampa, Florida.

Defendant: ALLEN DAVID POLLAK Telephone:____
Address: _____

Surety. _____ Telephone:_____
Address: _____

Surety. _____ Telephone:_____
Address: _____

Signed and acknowledged before me on 4/18/86.

_____
DEPUTY U.S. MARSHAL

Approved: /s/ ELIZABETH A. JENKINS
ELIZABETH A. JENKINS,
U.S. MAGISTRATE

GROUP APPENDIX 4

[May 15, 1986]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

ALLAN POLLAK, GEORGE KATSENES

Defendants.

No. 86 CR 296
Violation: Title 21, United States Code, Section 846

The SPECIAL JANUARY 1985 GRAND JURY charges:

1. From on or about April 10, 1986, to on or about April 15, 1986, at Chicago, in the Northern District of Illinois, Eastern Division and elsewhere,

ALLAN POLLAK and
GEORGE KATSENES,

defendants herein, did conspire with each other and with others known and unknown to the Grand Jury to knowingly and intentionally possess with intent to distribute kilogram quantities of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was a part of the conspiracy that on April 12, 1986, defendant ALLAN POLLAK agreed to purchase a kilogram of cocaine from Charles Petersen for $37,000.

3. It was further a part of the conspiracy that on April 12, 1986, defendant ALLAN POLLAK told Charles Petersen that defendant GEORGE KATSENES would deliver $37,000 to Charles Petersen for a kilogram of cocaine.

4. It was further a part of the conspiracy that on April 14, 1986 at approximately 12:30 p.m., defendant GEORGE KATSENES met Charles Petersen at the Holiday Inn City Center and agreed to act as the agent of ALLAN POLLAK for the purchase of a kilogram of cocaine for $37,000.

5. It was further a part of the conspiracy that on April 15, 1986, at approximately 3:00 p.m., defendant GEORGE KATSENES met Special Agent Robert Fanter of the United States Drug Enforcement Administration on the 15th Floor at the Holiday Inn Mart Plaza and delivered to Agent Fanter an envelope containing $37,000 for the purchase of a kilogram of cocaine.

In violation of Title 21, United States Code, Section 846.

A TRUE BILL:

_____

Foreperson

_____

United States Attorney

APPENDIX 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Assigned Judge: JOHN A. NORDBERG

Case Number: 86 CR 589-7 Date: June 10, 1987

Case Title: UNITED STATES v. ALLAN POLLAK

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

Jury verdict of guilty on all counts as charged in the superseding indictment. Post trial motions to be filed by July 2, 1987. Government to answer by July 10, 1987. Status hearing on post trial motions set for July 15, 1987 at 9:00 a.m. Sentencing set for August 27, 1987 at 10:00 a.m. Order bond increased to $200,000.00 to be co-signed by defendant, defendant's wife and defendant's parents. $15,000.00 cash and real estate previously posted to stand. Defendant's home in Chicago to be posted as additional surety.

* * * * *

APPENDIX 6

* * * * *

understood that at the time of sentencing the Court set a surrender date; Mr. Pollak intends to seek relief from the Court of Appeals in the nature of release pending appeal.

THE COURT: Right.

MR. ACKERMAN: In order to do so, the only thing we need is a dispositive order from your Honor declining to grant release pending appeal and such reasons as your Honor finds appropriate to support that.

THE COURT: Now, would the government want an opportunity to file a brief written response to this motion as well?

MR. SPENCE: Judge, if you'd like it. You've made findings previously.

THE COURT: Right. I'll permit you to make it. It seems to me that you can do it by an oral response at this time, if you wish.

MR. SPENCE: I would be happy to, Judge.

THE COURT: All right.

MR. SPENCE: The conditions under which Mr. Ackerman seeks Mr. Pollak's release would be guided by Title 18, Section 3143(b)(1) and (2) and with respect to the first test that would be applied, which relates to whether there is clear and convincing evidence that the person is not likely to flee or poses no danger to the safety of any other person or the community if released, *the Court has found that there is not such a danger nor is there a likelihood of flight.*

GROUP APPENDIX 7

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 25, 1987

By the Court:

Nos. 87-2394, 87-2395, 87-2412, 87-2413, 87-2414, 87-2425, and 87-2459

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SCOTT SOPHIE, MIGUEL MUELLE, HUMBERTO DUQUE, JORGE CARRICABURU, a/k/a JORGE LOUIS CARRICABURU, ALLAN D. POLLAK, HENRY LASKOWSKI, and ARTHUR CAMPOS and OPHELIA VELASQUEZ,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 86-CR-589—**John A. Nordberg**, *Judge.*

ORDER

As a result of the meeting on September 23 between defense counsel and the court's Senior Staff Attorney, James C. Schroeder, the court sets briefing in this case as follows:

1. Defendants Campos and Velasquez shall file the lead brief and required short appendix on or before April 5, 1988. Attorney Allan Ackerman will assist attorney Robert Bailey in writing this brief.

2. The remaining defendants shall file their supplemental briefs on or before May 5, 1988.

3. Plaintiff-appellee shall file its brief on or before July 5, 1988.

4. Defendants-appellants' rely briefs, if any, shall be filed on or before July 26, 1988.

If the trial transcript is finished after its currently scheduled completion date of December 7, 1987, defendants' attorneys may request an extension of time.

Appellants' counsel are ordered to assist the clerk of the district court in assembling one consolidated record for appeal.

NOTE: The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.

APPENDIX 8

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALAN POLLAK,

Defendant-Appellant.

No. 87-2425
U.S.D.C. No. 86 CR 589(7)
Honorable John A. Nordberg
U.S. District Court Judge

GOVERNMENT'S OPPOSITION TO DEFENDANT'S EMERGENCY MOTION FOR RELEASE ON BOND PENDING APPEAL

Now comes the UNITED STATES OF AMERICA, by its attorney, ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, and for its opposition of defendant Pollak's Emergency Motion for Release on Bond Pending Appeal, states as follows:

Defendant Pollak's motion for bond pending appeal is governed by the Bail Reform Act of 1984 which requires that he be detained pending appeal unless he demonstrates by clear and convincing evidence that: (1) he is not likely to flee or endanger anyone if released; (2) that

he is not appealing for purposes of delay; and (3) "that the appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial."* 18 U.S.C. §3143(b). This statute "requires an affirmative finding that the chance for a reversal is substantial. This gives recognition to the basic principle that a conviction is presumed correct." *United States v. Bilanzich*, 771 F.2d 292, 298 (7th Cir. 1985), *quoting from* S. Rep. No. 225, 98th Cong., 1st Sers. 27, *reprinting in* 1984 U.S. Code Cong. & Ad. News 3182, 3210. Under this statute, defendant Pollak bears the burden of showing the substantial nature of his appeal. *Id.*

* *The government agrees with Pollak that the only question for this Court to consider is whether the third element is satisfied.*

GROUP APPENDIX 9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

vs.

MICHAEL GORNY, et al.,
(Alan Pollak)

Defendants.

No. 86 CR 589
Judge John A. Nordberg

MOTION TO COMPEL SPECIFIC PERFORMANCE IN CONNECTION WITH AGREEMENT ENTERED INTO AS BETWEEN POLLAK AND THE GOVERNMENT

* * * * *

MOTION BY POLLAK FOR INDICTMENT DISMISSAL OR SUCH OTHER RELIEF AS THIS COURT DEEMS APPROPRIATE

* * * * *

REQUEST THAT THE COURT CONDUCT SUCH HEARINGS AS MIGHT BE APPROPRIATE TO DETERMINE FACTS IN CONNECTION WITH THIS SUBMISSION

Now comes Alan Pollak, defendant herein, by his attorney, Allan A. Ackerman, and respectfully moves that this Court in accordance with Rule 12, Fed.R.Crim.Proc.,

conduct such proceedings as might be necessary to resolve the matters presented herein.

1. Alan Pollak is charged along with some 15 other persons in a 28 count indictment alleging a series of frequently unrelated drug offenses over a period of years. There can be no doubt that post-April 15, 1986 Pollak could not be a conspirator within the fabric of the charges in the instant indictment.[1]

2. While some of the materials pertinent to these motions will be submitted "*in camera*" nonetheless, a general overview of that which is in controversy shall be the subject of submission.

(a) On or about April 25, 1986 Alan Pollak, in the company of defense counsel, visited in a casual manner with an Assistant U.S. Attorney; counsel for the government at that meeting was one of the Assistant U.S. Attorneys who are responsible for the instant prosecution;

(b) That as a result of the conversations as between Pollak and counsel for the government on or about *April 25, 1986* Pollak agreed to cooperate with the government;

(c) Within approximately a week of the April 25, 1986 conversation Pollak met, in the downtown area, for several hours with counsel for the government and special agents of the I.R.S. and the D.E.A.; this meeting lasted several hours and during this meeting Pollak gave the government information not only about himself but about other persons alleged to have conspired in the indictment at bar;

(d) Another meeting, approximately 2-3 weeks later took place where several special agents interviewed Pollak,

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[1] Pollak was arrested in early April, 1986; in fact, Pollak was arrested on or about April 15, 1986 and was in custody until approximately April 18, 1986. Pollak was released and returned to Chicago where he appeared in this District on any number of occasions commencing on or about April 25, 1986. On or about April 25, 1986 Pollak had his first encounter with the U.S. Attorney's Office in this District.

these agents again being from the I.R.S. and the D.E.A. and, there was at least a single Customs agent present at this meeting; once again, this meeting took several hours and during this meeting again Pollak tendered information not only about himself but about others in this case.[2]

3. The reasons for Pollak's tendered cooperation relate directly to the conversation as between Pollak and counsel for the government on or about April 25, 1986 in this federal building. During this conversation there was a relatively free exchange of thoughts and ideas as between Pollak and counsel for the government.

Toward the conclusion of the April 25, 1986 meeting counsel for the government related to Pollak that if he did not cooperate . . "he was looking at 10 years" . . Pollak thereafter (almost immediately) commenced to cooperate.

4. As recently as the last week in March, 1987 counsel for Pollak visited with counsel for the government. During this meeting (late March, 1987) counsel for the government again repeated that were Pollak to plead guilty the government was compelled to recommend a 10 year sentence.

The government's position (a 10 year recommendation on a guilty plea) was made to Pollak AFTER his extensive cooperation and after Pollak was told . . HE WAS LOOKING AT 10 YEARS IF HE DID NOT COOPERATE.[3]

---

[2] Defense counsel for Pollak was not present for any of these meetings and did not participate in same. The only knowledge defense counsel has regarding what was said is second-hand (and at that not very much at all).

[3] In May, 1986 at one of the meetings as between Pollak and several federal agents . . one of those agents, in the midst of that meeting told Pollak that if his answers weren't more accurate . . he would be looking at 5 years . . Pollak continued to answer questions honestly and candidly even after the 5 year direct threat.

(Footnote continued on following page)

5. Pollak submits, *in camera*, certain materials in support of this submission; the government is being provided with copies of that which the Court is receiving "*in camera*".

6. There can be little question that problems such as those at bar are now a frequent subject of controversy, e.g., *U.S. v. Verrusio*, 803 F.2d 885 (CA 7, 1986), *U.S. v. Fields*, 766 F.2d 1161 (CA 7, 1985).

It is our position that Pollak is entitled to *specific performance.*

By that we mean that the government should be compelled to give Pollak the benefit of his bargain . . or that this Court should enter an order dismissing the indictment.[4]

7. It is further Pollak's position that both counsel for the government (who stated that absent cooperation there would be a 10 year sentence) and the special agent from either D.E.A. or Customs (who said that Pollak would get 5 years if he "waffled" while answering certain questions) each had the presumptive authority to bind the government in matters of this kind, *U.S. v. Medico Industries, Inc.*, 784 F.2d 840, 845, 846 (CA 7, 1986).

Thus, it is our position, and our view of the case, that both counsel for the government and the special agents in this case were both clothed with that *quantum* of au-

---

[3] *continued*
Thus, the threat of incarceration was reduced from 10 years to 5 years by the special agent making the threat to Pollak; notwithstanding the putative 5 year threat . . Pollak continued to be candid with the government. Indeed, his very candor may make any trial in this case a *fait accompli* (conviction assured).

[4] At this juncture we have no way of ascertaining whether any facts will be in controversy; if the Court finds that there are facts in controversy then a hearing must be held in order that the Court determine the facts; the government should bear the burden of persuasion in such a matter, e.g., *U.S. v. Verrusio*, 803 F.2d at 891, 892; *U.S. v. Disston*, 582 F.2d 1108 (CA 7, 1978) (a hearing is necessary to determine facts).

thority to bind the government in connection with the "bargain at bar".

We suggest, respectfully, that "bargains" of this type cannot be unilaterally revoked by the government after the defendant has performed his part of the "bargain". Indeed, in other circumstances the Court has suggested that it is inappropriate to rely on the representations of the government, e.g., *U.S. v. Allen*, 798 F.2d 985, 995 (CA 7, 1986) (in *Jencks Act* matters the Court may not rely on representations by the government).

8. We find a submission of this kind to be an unpleasant affair; a bargain once made should be a bargain . . kept.

These particular circumstances are unnecessarily harsh because they are a reflection on not only the government, but on defense counsel as well (see *in camera* submissions).

CONCLUSION

We ask for a hearing only if there are facts in controversy; if there are no facts in controversy (and there may be none) then we ask for indictment dismissal as it relates to Pollak . . a current defendant who has clearly kept his part of the bargain.

Alternatively we would urge such other or further relief as this Court might deem appropriate, same not being limited to severance or such other relief as this Court ultimately deems within the fair administration of justice.

Respectfully submitted,

ALLAN A. ACKERMAN
Attorney for Alan Pollak

ALLAN A. ACKERMAN
Attorney at Law
2000 North Clifton Avenue
Chicago, Illinois 60614
312/332-2891

STATE OF ILLINOIS
COUNTY OF COOK—SS

IN CAMERA AFFIDAVIT

ALLAN A. ACKERMAN, first being duly sworn, on oath, deposes and states:

1. Your affiant is a member of this Court and has been a member of this Court for many, many years. Your affiant has appeared as defense counsel in this Court any number of times over the last score of years. Your affiant has appeared before the United States Supreme Court, the U.S. Court of Appeals for the First, Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits over the past score of years and your affiant has been admitted to practice before the Eighth Circuit as well. Your affiant has been admitted to practice in any number of U.S. District Courts throughout the United States. Your affiant has taught trial practice, has lectured for the National College of Criminal Defense Lawyers.

Your affiant has a high regard for the administration of justice throughout the federal courts in this country and particularly in this community.

2. Your affiant was present with Alan Pollak on or about April 25, 1986 when Pollak was in the federal building to appear before a U.S. Magistrate in connection with release-bail proceedings in this case. After completing our appearance before the Magistrate Pollak and your affiant met with A.U.S.A. Bill Spence in the second floor lunchroom. Your affiant keeps no notes of such visits; your affiant relies on his recollection of events within this affidavit.

3. Your affiant must relate that he has had . . and still has a high regard for A.U.S.A. Bill Spence, not only as a human being but as a lawyer. Indeed, had Bill Spence *not been* one of the government prosecutors in the case at bar . . it is unlikely that the events hereafter described would have even occurred.

4. On or prior to April 25, 1986 Pollak inquired of your affiant as to the type of person . . was [is] Bill Spence. Your affiant told Pollak that Spence was a high-grade, high-powered lawyer who was a man of his word, a man of integrity, a man on whose word you could rely. While I may not have used those exact words . . beyond any doubt that was the communication from your affiant to his client *vis-a-vis*, Bill Spence.

When your affiant, Spence and Pollak met on the second floor in the federal building on or about April 25, 1986 the meeting was casual, friendly. The meeting took perhaps one-half hour and during that meeting Spence made it clear to Pollak that there was much to be gained by cooperating with the government . . particularly at this early date . . and that certain of Pollak's future plans (employment opportunities) would not be worth much . . *because it was likely that Pollak would get 10 years if he did not cooperate.* Pollak inquired as to probation as a possibility . . Spence said he couldn't say, but he would not rule it out.

5. After that meeting ended . . Pollak asked your affiant not only on that day (it might have been a Thursday or Friday) but several times within the next 48 hours as to whether *Spence could be trusted* . . and your affiant consistently replied . . YES, ABSOLUTELY, HE IS AS GOOD AS HIS WORD.

6. Thereafter Pollak, after substantial soul-searching, and after communicating with your affiant agreed to cooperate with the government. Your affiant had told Pollak that he had to tell the truth to the best of his knowledge and recollection; that he had to be candid and open and above board . . and that that is what cooperation meant.

Indeed, it was your affiant, urging the integrity of Spence, that combined to push Pollak over the line from realistic defendant to informant. Such decisions are not made easily, and in this case your affiant continuously counseled the defendant as to the integrity and candor of A.U.S.A. Bill Spence.

7. Within approximately a week or so of April 25, 1986 your affiant, Pollak and counsel for the government met with any number of federal agents in a restaurant across the street from the federal building. The group (excluding your affiant) then went to another location so that the *debriefing* of Pollak could convene. It did.

Your affiant's current information is that Pollak answered questions, gave information, corroborated information already in the possession of the government and apparently did those things that an informant does during a lengthy and cumbersome "*debriefing*".

Your affiant was not present but as your affiant recalls this initial "debriefing" took place in a room at the Union League Club.

8. After that meeting there were a series of telephone calls as between your affiant and others; the bottom line was:

(a) The government was satisfied with that which Pollak told them and,

(b) They wanted to see him and talk to him again.

9. Within a week or 10 days after the *Union League Club* debriefing . . several federal agents again met with Pollak and spent approximately 2 hours with him again. As your affiant understands it it was during this meeting that a special agent of the Customs Service named Steve . . in essence, threatened Pollak with 5 years if Pollak withheld probative information.

Your affiant was not present for this meeting, your affiant did not participate in the meeting and your affiant is not privy to the exchange of information from either the first or second meeting although your affiant does recall . . that *Pollak was requested not to put certain people on notice* that he had met with the government because the persons he was requested not to contact . . were [perhaps still are] targets or subjects of either this or another closely related investigation; your affiant advised the defendant *not to contact* those persons because

to do so would be a breach of the agreement. To your affiant's knowledge Pollak did not contact the person or persons who were the subject of the government *non-contact request.*

10. Perhaps in June or July, 1986 the date or dates being uncertain to your affiant . . A.U.S.A. Spence contacted your affiant with regard to whether Pollak would testify before a federal grand jury (presumably in connection with this very case). Your affiant asked Spence what the status of the "bargain or agreement" was . . Spence could not answer because, according to Mr. Spence he had not had ample opportunity to clear everything with the front office. Accordingly, your affiant suggested that absent that . . it would seem a little foolish for Pollak to further immerse himself into his own grave (your affiant doubts that he used these words but clearly that was the gist of the conversation).

11. The matter stood, almost in limbo, until a date or dates uncertain to your affiant . . at which time Mr. Spence contacted your affiant and told your affiant that his office would only allow him to recommend a 10 year sentence for Pollak; that Spence was embarrassed, that this was not the only instance where he (Spence) had bargained in good faith for cooperation but that his office . . would not allow the fruition of the "good faith" bargain.

It is your affiant's distinct impression that Mr. Spence . . is *caught in the middle.*

Spence, on behalf of the government, bargained for cooperation under the assumption that he could fashion an agreement (or agreements) that would be fair to the administration of justice under the circumstances but that Spence had been undermined in his efforts by his office. (Certainly, these are your affiant's observations and counsel for the government is welcome to suggest the falsity of same *albeit* your affiant truly doubts that counsel for the government will contest the essential accuracy of these representations).

12. What we have now, in your affiant's view, is a prostituted circumstance or situation *not attributable to the defendant*; perhaps your affiant should shoulder some blame for trusting the U.S. Attorney (something your affiant seriously doubts in that your affiant is pained to think that someone of Spence's quality . . should not be trusted); perhaps the government should be blamed for giving government counsel the apparent authority to enter into bargains or agreements . . but then being compelled to withdraw the very consideration offered in the first instance . . simply because someone higher up disagrees with trial counsel for the government.

13. THE BOTTOM LINE.

The circumstances are squarely and fairly presented.

The situation cries for relief; the defendant is entitled to the benefit of his bargain . . a bargain entered into directly with counsel for the government.

14. A submission such as this is presented with reflection, pause and hesitation. We do not lightly ask the Court to intervene.

Your affiant would urge, that in the event this Court elects to conduct any hearing or hearings . . that such hearing or hearings be done in chambers.

As recently as March, 1987, counsel for the government again told your affiant that there was nothing he could do and that your affiant should do whatever must be done for his client.

Thus this submission.

There is an attachment to this affidavit which is also submitted *in camera* . . that submission being a note from the defendant to your affiant regarding the government's decision. Your affiant sent a copy of that note to Mr. Spence sometime in September, 1986 . . or perhaps October, 1986 . . and your affiant recalls that when Mr. Spence had the letter from the defendant . . that he said he thought the defendant was right and there might be

some flexibility (or some such thing); there has been none, the government's position is unyielding.

Respectfully submitted,

ALLAN A. ACKERMAN

SUBSCRIBED and SWORN to
before me this 7th day
of April, 1987.

Notary Public

IN CAMERA SUBMISSION

Alan Pollak
1207 Lynn Terrace
Highland Park, Il. 60035

Sept. 15, 1986

Allan A. Ackerman
2000 N. Clifton Ave.
Chicago, Il. 60614

Dear Allan,

These are some of my thoughts and feelings regarding the news from the U.S. Attorney's office.

1) On April 25, 1986, you will recall a meeting between you, and I, and Mr. Spence in the Federal Building cafeteria. I was discussing my plans in a real estate career when Mr. Spence responded to me, "It isn't going to make a bit of difference if you are going to prison for the next ten years." We discussed the possibilities of a probation and the benefits of my cooperation with the U.S. Attorney's office. Mr. Spence stated that, "In exchange for your complete candor, I'll see what we can do, but if you insist on playing this game, and it is a game, you are going to go for ten years, unless Allan (Ackerman) has something up his sleeve which I cannot possibly believe would change a thing."

2) At our meeting in the Union League Club, Mr. Spence was genuinely pleased with my interview and stated to me at the conclusion, "I cannot promise anything to you, but I'll see what can be done in light of your cooperation and candor, but I cannot promise you, of course." I, in absolutely no manner, asked him about this issue. It was brought up by him out of his genuine good feelings concerning the meeting.

3) At a second meeting at Allan's office, a threat was hurled at me by Steve (Custom's Agent) when he felt I was not telling all I should concerning some issue (however, I told all that I did know), "Would five years affect your family life and future plans?" I told him it certainly would be disasterous, and I hoped for a probation and/or dismissal altogether. Steve did not think this suggestion to be preposterous, and was quite pleased with the meeting when it ended. I should state that five years was considered to be a threat and meant to be extreme by him.

4) On May 22, at the Federal Building, Mr. Spence and I rode down the elevator and he stated matter of factly to me that he was pleased with everything and that there would be a superceding indictment and then we would wrap things up. Once again, he volunteered this information and by his mood, I certainly sensed he was pleased with everything Allan and I had done for him in the case.

5) On August 25, before entering the courtroom, Mr. Spence and I exchanged greetings, and he told me he had talked with his boss about me and was awaiting an answer. By his tone, he certainly meant a *favorable* answer. This is an important man and not someone whose recommendations are to be disregarded, nor someone without power and influence over his office, as is clearly suggested by the failure of the Prosecution to uphold any of its words.

The decision to reveal facts involving myself and others, starting in April 1986, was based totally on representations, both direct and implied, by Assistant U.S. Attorney Bill Spence. It was Mr. Spence, looking me straight in the eyes, and telling me I would go to prison for ten years if I did not cooperate; and that even a probation was possible if I did cooperate which caused me to decide to cooperate fully with him.

As a result of that faith in Mr. Spence, personal and private things were revealed to a *group* of agents by me. This faith in Mr. Spence was based not only on my own observations, but from statements from my lawyer, Allan Ackerman, that Bill Spence is as good as his word. I surely would not have agreed to any of this were it not for Bill Spence's direct and indirect representations.

Sincerely,

/s/ ALAN POLLAK
Alan Pollak

APPENDIX 10

United States of America vs ALLAN POLLAK

United States District Court for NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION DOCKET NO. 86 CR 589-7

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 08-27-87

____ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL GLENN SEIDEN

____ GUILTY, and the court being satisfied that there is a factual basis for the plea.

____ NOLO CONTENDRE

_X_ NOT GUILTY

There being verdict of ____ NOT GUILTY. Defendant is discharged

_X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully selling, distributing or dispensing cocaine IN VIOLATION OF TITLE 21 USC SECTIONS 846, 843(c), as charged in count 1, 10, 16 and 18 of the superseding indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant

is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) YEARS on counts 1 and 10.

IT IS FURTHER ORDERED that on counts 16 and 18 consecutive to counts 1 and 10, concurrent to each other, the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of FIVE (5) YEARS, on condition that he comply with the general conditions of probation and the following special conditions; 1) defendant must remain free of all illegal drugs over the period of probation and be subject to periodic monitoring by the probation department; and 2) defendant is required to pay a fine of $5,000.00 to the United States as directed by the probation office over the period of probation.

Defendant is assessed $200.00 pursuant to 18 USC 3013.

On oral motion of the government, the original indictment is dismissed. Defendant is to surrender to the designated facility by noon on October 6, 1987. Bond to stand to date of surrender.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends, Camp at Oxford, Wisconsin.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ JOHN A. NORDBERG
U.S. District Judge

No. 87-780

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALAN D. POLLAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
KAREN SKRIVSETH
Attorney
Department of Justice
Washington, D.C. 20530
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12 pp

QUESTION PRESENTED

Whether petitioner is entitled to be released pending appeal under 18 U.S.C. (Supp. IV) 3143(b)(2) on the ground that his appeal "raises a substantial question of law or fact likely to result in reversal [or] an order for a new trial."

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The order of the court of appeals was entered on September 21, 1987. The petition for a writ of certiorari was filed on November 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to distribute cocaine (21 U.S.C. 846), on one count of attempting to distribute cocaine (21 U.S.C. 846), and on two counts of facilitating the possession and distribution of cocaine (21 U.S.C. 843(b)). He was sentenced to six years' imprisonment on

the conspiracy and attempt counts, to be followed by five years' probation on the facilitation counts. Pet. App. 28a-29a. He was also ordered to pay a $5,000 fine.

The evidence at trial[1] showed that two Chicago drug dealers, Charles Petersen and Gary Raffanti, were convicted in February 1986 of offenses relating to the distribution of 225 kilograms of cocaine in Chicago over a five-year period. After the convictions, they began cooperating with the government by providing names of their major customers and by acting in an undercover capacity. Petitioner was named as a major customer who purchased one kilogram of cocaine per month from 1980 or 1981 through late 1985. In April 1986, Petersen, acting in an undercover capacity, arranged for petitioner to purchase one kilogram of cocaine for $37,000. Petitioner was arrested after his agent delivered the $37,000.

After his arrest, petitioner cooperated with the government and engaged in plea negotiations. During the negotiations, petitioner gave the government information regarding his role in the drug trafficking conspiracy. The government offered to permit petitioner to plead guilty in exchange for a government recommendation that he not be imprisoned for more than ten years. See Gov't Opp. to Def. Emer. Mot. for Release on Bond Pending Appeal 2. Petitioner did not accept the offer, but instead obtained new counsel and proceeded to trial.

Petitioner was tried with seven co-defendants. The evidence against petitioner at trial consisted entirely of tape-recorded conversations between petitioner and Petersen and testimony from Petersen and Raffanti. Following his conviction, petitioner filed an emergency motion for bail pending appeal. The district court denied the motion.

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[1] The transcript of the five-week trial is not yet available. The facts related above, however, are not in dispute.

Petitioner then filed a motion with the court of appeals for release pending appeal. After stating that the standard for such release was whether the appeal presented "a 'close' question . . one that could be decided either way . . that is . . it is a toss-up or nearly so" (Emer. Mot. 3), petitioner argued that two of the issues he intended to present on appeal were "close" questions. See Emer. Mot. 3 n. 3. First, he contended that the district court erred in failing to conduct an evidentiary hearing on the question whether the government breached an unwritten plea agreement.[2] Second, petitioner contended that the government "may" have used information against him at trial that he provided under an implied grant of immunity. See Emer. Mot. 7.

On September 21, 1987, the court of appeals denied petitioner's emergency motion for release pending appeal. The court held that petitioner "has failed to demonstrate by clear and convincing evidence that this appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial." Pet. App. 2a. On October 7, 1987, Justice Stevens denied petitioner's application for release pending appeal (Pet. App. 3a).

ARGUMENT

Petitioner contends (Pet. 6-10) that a convicted defendant who is found not to pose a risk of flight or danger to

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[2] Petitioner first raised this question in the district court in a motion to compel specific performance of a plea agreement (Pet. App. 14a-27a). Papers attached to the motion indicate that in petitioner's first meeting with the prosecutor, petitioner was told that he could receive ten years' imprisonment if he failed to cooperate, that petitioner met with the prosecutor for "debriefing" on two subsequent occasions, that on two occasions the prosecutor told him he would see what he could do if petitioner cooperated and that ultimately the prosecutor told defense counsel that the government would not authorize a sentence recommendation of less than 10 years' imprisonment. *Ibid.*

the community must be released pending appeal if his issues on appeal are not frivolous. He argues that this Court should adopt the historical "frivolousness" test that was applied to bail determinations before enactment of the Bail Reform Act of 1984, 18 U.S.C. (Supp. IV) 3141 *et seq.* (Pet. 8-10). Petitioner did not make this argument in the court of appeals. In any event, the argument overlooks the effect of the Bail Reform Act, which was to repeal the "frivolousness" test and replace it with a more exacting standard.

Before the Bail Reform Act became effective on October 12, 1984, a defendant had to be released on bail pending appeal unless the court found that his release would present a risk of flight or danger to the community or unless the appeal was "frivolous or taken for delay" (18 U.S.C. 3148).

The Bail Reform Act of 1984, however, provided that a court may release a convicted defendant pending appeal only if it finds "that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal [or] an order for a new trial." 18 U.S.C. (Supp. IV) 3143(b)(2). As the Senate Committee on the Judiciary explained, the purpose of the new statute was to eliminate the presumption that a convicted defendant should be released pending appeal. See S. Rep. 98-225, 98th Cong., 1st Sess. 26 (1983). The Committee stated (*ibid.*):

> Once guilt of a crime has been established in a court of law, there is no reason to favor release pending * * * appeal. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.

The Committee further noted that, in order to "give[] recognition to the basic principle that a conviction is presumed to be correct," a convicted defendant may be released pending appeal only after "an affirmative finding

[by the court] that the chance for reversal is substantial" (*id.* at 27).

Because the Bail Reform Act expressly changed the law, prior judicial statements concerning whether an appeal was frivolous are no longer relevant to the availability of bail pending appeal. Under the Bail Reform Act, a convicted defendant may be released pending appeal only if the appeal "raises a substantial question of law or fact." 18 U.S.C. (Supp. IV) 3143(b)(2). See *United States* v. *Miller*, 753 F.2d 19, 23 (3d Cir. 1985) ("a defendant seeking bail on appeal must now show that his or her appeal has more merit than under the discarded 'frivolous' test"); see also *United States* v. *Giancola*, 754 F.2d 898 (11th Cir. 1985) (agreeing with the Third Circuit that the Bail Reform Act repealed the "frivolousness" test), cert. denied, No. 86-491 (Dec. 15, 1986).

Contrary to petitioner's suggestion (Pet. i), the "substantial question" test in the Bail Reform Act is not so vague as to be unintelligible. The leading case defining the meaning of "substantial question" is *United States* v. *Giancola, supra.* In that case, the Eleventh Circuit held that a "substantial question" is "a 'close' question or one that very well could be decided the other way." 754 F.2d at 901. The First, Second, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have followed the Eleventh Circuit's articulation of the "substantial question" test. See *United States* v. *Shoffner*, 791 F.2d 586 (7th Cir. 1986); *United States* v. *Pollard*, 778 F.2d 1177 (6th Cir. 1985); *United States* v. *Bayko*, 774 F.2d 516 (1st Cir. 1985); *United States* v. *Affleck*, 765 F.2d 944 (10th Cir. 1985); *United States* v. *Powell*, 761 F.2d 1227 (8th Cir. 1985), cert. denied, 476 U.S. 1104 (1986); *United States* v. *Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985); *United States* v. *Randell*, 761 F.2d 122 (2d Cir. 1985).

In *United States* v. *Handy*, 761 F.2d 1279 (1985), the Ninth Circuit agreed with the uniform decisions of the other circuits that the "substantial question" test requires

more than the discarded "frivolousness" test. The Ninth Circuit, however, chose to characterize a "substantial question" as one that is "fairly debatable" (*id.* at 1283) (citation omitted). And in *United States* v. *Smith,* 793 F.2d 85 (1986), cert. denied, No. 86-693 (Jan. 12, 1987), the Third Circuit adopted the "fairly debatable" formulation used in *Handy* rather than the "close question" formulation used in *Giancola. Id.* at 89.

It is unclear whether the slight difference in the two formulations of the "substantial question" test has any practical effect. For example, in *United States* v. *Messerlian,* 793 F.2d 94 (1986), the Third Circuit ordered a defendant's release only after noting that his legal issues were substantial under both the "close question" and "fairly debatable" formulations. For that reason, we believe that there is no need for this Court to attempt further to refine the meaning of the term "substantial question" under that Bail Reform Act. Under either formulation, it is clear that bail may not be granted pending appeal unless the defendant satisfies his burden of showing that his appeal raises a difficult legal or factual question that presents a significant chance of reversal of his conviction. As the Seventh Circuit aptly noted, further efforts at defining the standard "might give the impression that this determination is susceptible of mathematical precision." *United States* v. *Shoffner,* 791 F.2d 586, 588-590 (1986).[3]

In any event, the issues that petitioner raises do not satisfy either the "fairly debatable" standard of *Handy* or the "close question" standard in *Giancola.* Petitioner's arguments before the Seventh Circuit apparently will be

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[3] Petitioner's apparent suggestion (Pet. 10 n.8) that the Eighth Amendment bars detention pending appeal has no merit. See *United States* v. *Williams,* 822 F.2d 512, 517 (5th Cir. 1987); *United States* v. *Powell,* 761 F.2d at 1234. This Court has never hinted that a person convicted of a federal crime and sentenced to prison has a constitutional right to be released pending appeal.

based on his pretrial dealings with government attorneys. Petitioner contends that he is entitled to an evidentiary hearing to determine whether the government breached an unwritten plea agreement or used evidence that was obtained from petitioner under a grant of immunity. Nothing in the record, however, supports petitioner's contentions.

According to petitioner's in camera submission (Pet. App. 25a-27a), which presumably relates the facts in the light most favorable to petitioner, an Assistant United States Attorney stated that he would "see what can be done in light of [petitioner's] cooperation and candor" (Pet. App. 25a). Petitioner concedes that at that time the government attorney told him "I cannot promise anything to you" (*ibid.*). The government ultimately offered to recommend a ten-year sentence in exchange for petitioner's guilty plea. Petitioner rejected that offer and proceeded to trial. Thus, even under petitioner's own version of the facts, it is clear that the parties never reached a plea agreement.

Nor does petitioner point to anything in the record indicating that the government used evidence at trial that was obtained from petitioner under a grant of immunity. Petitioner cites nothing showing that he was ever granted immunity. Moreover, the evidence at trial consisted entirely of tape-recorded conversations between petitioner and Petersen and the testimony of Petersen and Raffanti. The tape-recorded evidence obviously predated petitioner's discussions with the government, as did the availability of Petersen and Raffanti as witnesses. Petitioner has not suggested how he would show that the government impermissibly used evidence obtained under a grant of immunity or during the plea bargaining process against him at trial. Hence, it is plain that petitioner's legal arguments on appeal meet no announced test of substantiality.[4]

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[4] Petitioner's further contention (Pet. 17-19) that the government's conduct denied him his Sixth Amendment right to counsel is wholly

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
KAREN SKRIVSETH
Attorney

JANUARY 1988

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without merit. The premise for that claim—that the government engaged in misconduct—is faulty for the reasons discussed above. Moreover, petitioner's decision to dismiss his counsel because he was disappointed that the government did not offer a favorable plea bargain as counsel had predicted does not constitute a denial of effective assistance of counsel.

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60234